

Francis Sinclair, Esq; Brother of the Right Honourable Alexander Earl of Caithness, and his Majesty's Advocate for Scotland, } Appellants.

The Right Honourable John Earl of Broadalbane, Sir William Dunbar, Sir William Sinclair, and George Sinclair of Ulbster, Esq; } Respondents.

The Appellants C A S E.

BY Articles made and executed between George Earl of Caithness, and Sir Robert Sinclair of Longformacus, it was covenanted and agreed, that the said Earl should pay to Sir Robert Sinclair 108000 Merks, or 60000*l. sterl.* which he accepted, in full Satisfaction of the Debts in his Person, amounting then to 8444*l. 8s. 10d. sterl.* besides Interest established by Apprisings and other real Rights, over the Estate and Earldom of Caithness; PROVIDED "That if this compounded Sum should not be paid betwixt and the Term of Martinmas, 1675, Sir Robert Sinclair should have Liberty to make Use of the Apprisings and other Rights in his Person, to the full extent of the Sums therein contained; but in Case of such punctual Payment, Sir Robert Sinclair is bound to denude himself of all Right standing in his Person, in so far as may extend to the Debts and Sums due to the said Sir Robert and his Cedents, with Warrantice from Fact and Deed; and that in favour of the said Earl, or any Person he should please to nominate."

Immediately after this Transaction, George Earl of Caithness executed a Disposition or Conveyance, reciting, "That John Campbell of Glenorchy, (afterwards Earl of Broadalbane) had advanced, paid, and delivered to his Lordship and his Creditors in his Name and by his Direction certain great Sums." Therefore he conveyed and disposed the whole Estate and Earldom of Caithness, (of yearly Value 3000*l. sterl.* or thereabouts) with the heretable Jurisdictions and Titles of Honour, in Favour of the said John Campbell of Glenorchy; with the Reservation of an Annuity for Life of 12000 Merks, or 666*l. 13s. 4d. sterl.* to the Earl and Countess of Caithness, and the Survivor of them, and with the following Proviso, "Declaring likewise, as it is hereby specially provided and declared, AND SHALL BE CONTAINED IN THE INFEEFMENTS TO FOLLOW HEREON, that in Case there shall happen to be no Redemption of the Lands and Estate and others above written, from the said John Campbell of Glenorchy and his forefairs, by Virtue of a Reversion granted by him of the Date of these Presents, upon Payment of the great Sums of Money therein contained, at the Time and Manner therein expressed precisely, and Implement of the remanent Conditions thereof, so that the foresaid Lands, Living, and Estate, Title of Honour and Dignity, shall fall, accresce, and pertain to the said John Campbell and his forefairs heretably and irredeemably for ever, then he and his forefairs shall be holden and obliged to assume, wear, and use the Surname of Sinclair, and Arms of our House of Caithness."

A Charter under the Great Seal was thereupon obtained, and the said John Campbell of Glenorchy was duly infeoffed in the said Lands and Earldom of Caithness; but the Clause of Reversion before recited, is neither mentioned in this nor in the subsequent Infeoffments of the Estate.

The Letter of Reversion referred to in the foresaid Disposition provides and declares, 1^{mo}. "That the Estate, Offices, and others thereby disposed, should be redeemable by Glenorchy, and his Heirs and Assigns, within the Space of Five Years next, and immediately following the Term of Martinmas then last 1672, by Payment or Confignation, in the Manner therein mentioned, of the Sum of 108,000 Merks Scots, which he Glenorchy (as the Person nominated by the Earl) was to pay to Sir Robert Sinclair, upon his denuding himself in Favour of Glenorchy, of the Apprisings and others, which Sir Robert for himself, and as Assignee by the other Creditors therein named, had upon the said Estate, with Interest of the said Sum from Whitsunday then last.

"As also, 2^{do}. By Payment to Glenorchy of the Sum of due to him by apprising the 11th of January, 1672; and which, from the apprising itself, appears to have been 26,661*l. 8s. Scots*, or 2221*l. 15s. 8d. sterl.*

"As also, 3^{io}. By Payment to him of 12000 Merks Scots Money, which he was obliged to pay of yearly Annuity to said Annuity, from the termly Payments thereof, at least so much of the same, as should happen not to be satisfied by the Free Rents of the Estate after Deduction of the Interest of the foresaid Sums and other Debts after-mentioned, and the Feudal Duties, public Burdens, and Charges of managing the Estate in its Rents and Jurisdictions."

"As also, 4^{to}. By Payment to Glenorchy of the several Sums after-mentioned, and Interest thereof due to him by the Earl, viz.—Then follows an enumeration of five several Bonds, due by the Earl of Caithness to Glenorchy, all dated between the 9th of October, 1672, and 9th of May, 1673, one of these Bonds being for no greater Sum than 14*l. 10s. sterl.* and the whole amounting to 13,023*l. 13s. 8d. Scots*, or 1085*l. 6s. 1d. sterl.*

"As also, 5th, by payment of all other Sums of Money lent and advanced, or which should be lent and advanced, by Glenorchy to the Earl, or to pay his other Creditors, with the Interest due thereon the Time of Redemption, with all other Sums or Expences which Glenorchy should be put to in obtaining himself publicly sealed, and perfectly secured in the Estate, and in maintaining the Right thereof; at least, by making Payment to Glenorchy of so much of the aforesaid Sums and Interests, as should be resting, owing, and unsatisfied, by his Intromission with the Rents of the Estate; and that, upon Payment or Confignation of the aforesaid Sums, upon previous Notice to be given at the Time and Place therein mentioned, the said John Campbell of Glenorchy should grant a sufficient Renunciation and Discharge, or Resignation, of the said Disposition, Apprisings, and other Rights that were, or should be, in his Person, as coming from the said Sir Robert Sinclair, with Warrantice from the proper Facts and Deeds of Glenorchy and his forefairs, excepting therefrom an Infeftment, granted, or obliged to be granted, by him to the said

for the more sure Payment of the said yearly Annuity, during the Lifetime of the Earl and Countess, and of which the User of the Redemption should be obliged to relieve Glenorchy."

Then follows a Clause prorogating the Redemption for the Space of one Year, next after the Expiration of the said five Years. And failing of Redemption within that Year also, then the Reversion before written should expire, and be void, siclike as if the same had never been granted, and that by way of Exception, without any Necessity of Declarator, or legal Process thereanent."

"But

"But yet nevertheless, if it should happen the said Earl George to have a Son, procreated of his own Body, it should be lawful to the said Son to redeem the said Lands, Living, and Estate, at any Term of *Whitsunday* or *Martinmas* thereafter, by Payment to *Glenorchy* and his forefairs, or Consignation for their Use, of the several Sums above written, and relieving him and his forefairs of the said Annuity, together with the Sum of Money aforesaid, by and attour the forefairs Sums and Conditions, and which, in case of Redemption by the said Son of the Earl's Body, is then also to be paid by him to *Glenorchy*, and his forefairs, or assigned for their Use, otherwise no Redemption to be reputed lawful.

"Declaring allwise, that during the Continuance of the Reversion, *Glenorchy* and his forefairs should only be accountable for their actual Intromissions with the Rents, and no further, and dispensing with the not Resignation thereof, and all other Solemnities of *Redemption*."

Decree against Sir Robert Sinclair, to fulfil his Agreement with the Earl of Caithness.
23 Feb. 1673.

Sir Robert Sinclair, notwithstanding the Agreement before mentioned, having entered into the Possession of the Estate of *Caithness*, by virtue of his Rights and Appurtenances, an Action was brought before the Court of Session for Implement of the said Agreement; and the Lords, of this Date, ordained the said Sir Robert Sinclair to desist from exercising the Offices of Justiciary Chamberlainry, and Sheriffdom of *Caithness*, and from receiving the Rents and Profits of the Estate, until the Term of *Martinmas* 1675, the Time limited by the Agreement before mentioned, for paying to Sir Robert Sinclair the Sum of 6000 *l.* Sterling, and Interest thereof, due to him by the Earl of *Caithness*, or until the Earl failed in performing the Conditions on his Part of the said Agreement.

John Campbell of Glenorchy, enters to the Possession of the Estate of *Caithness* in 1672, and pays Sir Robert Sinclair's Debt.
22d of Nov. 1675.
Parcels of the Estate sold by Glenorchy.
26 Nov. 1675.

In virtue of the said Right and Disposition, the said John Campbell of Glenorchy entered into the Possession of the whole Estate and Earldom of *Caithness*, in 1672; and three Years after, having paid Sir Robert Sinclair the forefairs Sum of 6000 *l.* Sterling, he of this Date obtained a Conveyance from Sir Robert of the Rights and Appurtenances in his Person affecting the Estate of *Caithness*.

At the same Time the forefairs John Campbell sold, under an Equity of Redemption, the Lands of *Dunnet*, a Parcel of the Estate of *Caithness*, to David Murray of *Clairden*, for the agreed Price of 1605 *l.* 11 *s.* 1 *d.* Sterling; and a Contract of Wadsett, now exhibited, was thereupon executed between the said John Campbell, with Consent of the Earl and Countess of *Caithness*, and the said David Murray.

27 Nov. and 24 Dec. 1675.
27 Nov. 1675.
The Infeoffment recorded, 22d April 1687.
28 Dec. 1675.
The Infeoffment recorded, 27 Feb. 1679.
28 Dec. 1675.
The Infeoffment recorded 12 Aug. 1681.
28 Dec. 1678.
The Infeoffment recorded, 12 Aug. 1681.

Another Parcel of the Estate called *Keiss*, was sold in the same Manner to John Dumbear of *Hemprigs*, for 611 *l.* 2 *s.* 2 *d.* Sterling, by a Contract of Wadsett, which is likewise exhibited.

A third Parcel of the Estate, called *Oldwick* and *Kirkfield*, was sold in the same Manner to Alexander Sinclair, of *Telfane*, for the agreed Price of 833 *l.* 6 *s.* 8 *d.* Sterling.

A fourth Parcel of the Estate, called *Chib*, was sold in the same Manner to John Sinclair of *Ulster*, for the agreed Price of 859 *l.* 3 *s.* 4 *d.* Sterling.

A fifth Parcel of the Estate, called *Subster*, was sold in the same Manner to Francis Sinclair of *Stirreck*, for the agreed Price of 1124 *l.* 14 *s.* 5 *d.* Sterling.

A sixth Parcel of the Estate, called *Thursater* and *Bilbustar*, of the yearly Rent of 100 *l.* Sterling, or thereabouts, was sold irredeemably to the said Francis Sinclair of *Stirreck*, the Price whereof, not being specified in the Conveyance, being computed at eighteen Years Purchase, amounted to 1800 *l.* Sterling.

The Prices arising from these Sales, received by the said John Campbell of Glenorchy, amounted, in the whole, to 6833 *l.* 17 *s.* 9 *d.* Sterling.

George, the first Earl of *Caithness*, dies in 1676.

The said George Earl of *Caithness* died at his House of *Thursater*, in the County of *Caithness*, in May 1676, and the said John Campbell of Glenorchy, then living in family with him, attended his Funeral, had Access to the whole Title-Deeds and Writings of the Family, and soon after married the Widow of George Earl of *Caithness*.

And is succeeded by George, the second Earl of *Caithness* his Cousin, who takes Possession of the Estate.

George Sinclair of *Keiss*, Cousin of George Earl of *Caithness*, and undoubted Heir to his Estate and Honours, immediately assumed the Title and Dignity of Earl of *Caithness*. And in the Year 1677 he entered into the Possession of the Lands of *Keiss*, *Tister*, and *Northfield*, his paternal Estate, which had been possessed by the late Earl of *Caithness*, as his Guardian, and soon after he took Possession of the Estate and Earldom of *Caithness*.

The Earl of Broadalbane recovers the Possession of the Estate by Force of Arms.

The said John Campbell of Glenorchy, who, after the Death of George Earl of *Caithness*, had for some time assumed the Title of Earl of *Caithness*, was soon after created Earl of *Broadalbane*, and upon an Application to the Crown, representing, that he had been violently dispossessed of the Estate of *Caithness*, to which he had an absolute Right by the Disposition beforementioned, he obtained an Order from his Majesty to the Privy Council of Scotland, to restore him to the Possession of the said Estate.

11 Nov. 1679.

By a Warrant of the Privy-Council, The Earl of *Broadalbane* attended by a Party of the King's Troops, and his Friends and Followers in the Highlands, went to *Caithness*, and having engaged a Party of Men belonging to the Earl of *Caithness*, near the Village of *Old Marlack*, he defeated them, and obliged the Earl to yield the Possession not only of the Estate of *Caithness*, but likewise of his own paternal Estate of *Keiss*, *Tister*, and *Northfield*; and for maintaining his Possession he placed Garrisons in the Castle of *Sinclair*, *Girnigo* and *Aikergill*.

August 1681.
The Earl of *Caithness* applies to the Parliament of Scotland by Petition.

Soon after the Earl of *Caithness* applied by Petition to the Parliament of Scotland, setting forth, "That George Earl of *Caithness* then deceased, had disposed his Estate to the Earl of *Broadalbane*, for enabling him to pay certain Debts due to Sir Robert Sinclair and others; but in Trust and redeemable upon Repayment to the Earl of *Broadalbane* of the Sums he should advance;—That the Earl was fully repaid all his Advances by Sales of Parts of the Estate, and by his Intromissions with the Rents and Profits thereof for several Years.—That he had got Possession of all the Title-Deeds and Writings of the Family, and particularly of the Letter of Reversion, declaring the Estate redeemable, and finding the Earl of *Caithness*, by Addresses to his Majesty, and by Pursuits before the *Judicatures*, was endeavouring to recover his just Right, he had first moved a Pursuit before the Inferior Court against the Earl of *Caithness*, and this and other Means proving ineffectual, he had upon false Suggestions obtained a Warrant from the Crown, and in Consequence thereof, had dispossessed the Earl of *Caithness* not only of the Estate and Earldom of *Caithness*, but likewise of his own paternal Estate, and Praying to be repossessed of his said paternal Estate, and that the Charter-Chest of the Family of *Caithness* might be sequestrated, and that the Earl of *Broadalbane* might be ordained to depone concerning his abstracting any Writings from thence, and particularly concerning the said Letter of Reversion."

7 Sept. 1681.
The Earl of *Broadalbane*'s Answers to the Earl of *Caithness* Petition.

By an Order of Parliament, the Earl of *Broadalbane* put in Answers to this Petition, and maintained, That he had an absolute Right to the Estate of *Caithness*, and to the Lands of *Keiss*, *Tister*, and *Northfield*, by Virtue of the Disposition 1672, from the Earl of *Caithness*, and by Virtue of the Appurtenances and Adjudications acquired from Sir Robert Sinclair and others; and with respect to Title Deeds and Writings of the Estate, and particularly the Letter of Reversion. It was answered, "That the Earl of *Broadalbane* had received many of the Rights of that Estate from the late Earl of *Caithness* in his own Lifetime, and the Remainder and greater Part of the Rights from Sir Robert Sinclair when he paid him his Money, so that he had got these Rights by no indirect Methods, but in the usual and legal Manner, by the Party Disposer delivering them to the Party Buyer, and whatever Sums he had raised upon Mortgages in *Caithness*, were but very inconsiderable, and for which he was not accountable to any Person, HIS RIGHTS BEING IRREDEEMABLE AND HE ABSOLUTE PROPRIETOR; AND THOUGH THE EARL OF CAITHNESS COULD PRODUCE A REVERSION, WHICH HE CANNOT, he could not found thereupon, until he establish a Right thereto in his own Person, and use an Order and declare the same; and if he apprehend there is any such Reversion, he may pursue for Exhibition thereof before the Lords of Session, as is usual in like Cases for all the Leiges."

15 Sept. 1681.
The Petition and Answers referred to the Privy Council.
17 Sept. 1681.
23 Sept. 1681.
Judgment of the Privy Council restoring the Earl of *Caithness* to the Possession of a Part of the Estate.
30 Aug. 1683.

Upon this Petition and Answers, the Lords of the Articles gave it as their Opinion that the same should be referred to his Majesty's Privy Council.

This Opinion being reported to Parliament, the same was approved of, and upon the 23d of September, 1681, the Cause having been heard before the Privy Council, they found "That the Earl of *Broadalbane* had unwarrantably dispossessed the said Earl of *Caithness* of the said Lands of *Keiss*, *Tister*, and *Northfield*; and therefore ordained the Earl of *Broadalbane* to repossess the Earl of *Caithness* in the said Lands, at the Sight of the Sheriff of *Sutherland* or *Ross*, or their Deputies, or any of them; and if Need be, ordained Letters on a Charge of fifteen Days, to be directed on the said Decree."

Soon after the Earl of *Broadalbane* obtained a Remission from his Majesty for his Acts and Proceedings, in Relation to his seizing and keeping Possession of the Estate of *Caithness*, and particularly for his unwarrantably placing Garrisons in the Houses and Castles of *Sinclair*, *Girnigo* and *Aikergill*.

Pursuant

Pursuant to the Judgment of the Privy Council, the said George Earl of Caithness having obtained Possession of his paternal Estate of *Keiss, Tisler, and Northfield*, he continued therein till his Death in 1698, when the Earl of Broadalbane again took Possession of these Lands, and placed a Garrison of armed Men in the House of *Keiss*.

The said George Earl of Caithness was succeeded by his Cousin John Earl of Caithness, who dying in 1703, was succeeded by his Son Alexander, now Earl of Caithness.

In the Year 1718, the said Alexander, Earl of Caithness, began a Treaty with the late Earl of Broadalbane, in the View of recovering a Part of the Estate of Caithness, and the heretable Jurisdictions then remaining unsold; but this Treaty proving ineffectual, John Sinclair, of Ulster, Father of the Respondent George Sinclair, purchased the Right of the Earl of Broadalbane, having had full Notice of the Earl of Caithness's Claim, and having agreed to warrant the Earl of Broadalbane absolutely, and to relieve him from all Claims that might be moved against him, with Respect to the Estate and Earldom of Caithness.

The Disposition 1672, having been soon after registered in the Books of Session, the Nature of the Right by which the Estate had been so long held and possessed, was then first truly and certainly known, and the Earl of Caithness soon after executed a Bond to the Appellant his Brother, as his Trustee, who thereupon sued for, and recovered a Degree of Adjudication of the whole Estate and Earldom of Caithness; in Virtue whereof, he was properly entitled by the Law of Scotland, to prosecute every Right and Claim his Brother the Earl of Caithness could have to the said Estate.

An Action of Reduction and Improbation was thereupon instituted in the Court of Session, in Name of the Appellants, against John Earl of Broadalbane, John Sinclair of Ulster, Sir James Sinclair of Dunbeath, and Sir James Dunbar of Hemptonrig; insisting, that the whole Writings and Evidents relative to the Estate of Caithness, and other Lands therein mentioned, and particularly the fore said Disposition 1672 should be exhibited; and that it should be found and declared, that the Respondents had no Right to the said Lands and Estate.—That none of the Respondents had possessed the said Lands and Estate, peaceably without Interruption, for the Space of forty Years. That the said Alexander Earl of Caithness, or his Predecessors, had by Process and other legal Means, interrupted the Respondents Right by Prescription.—That any Right the said Earl of Broadalbane, or his Predecessors, had to the fore said Lands and Estate, was in virtue of the fore said Disposition from the said George Earl of Caithness, which contained a Clause of Reversion in the Body of the Deed, relative to a Letter of Reversion apart, by which the said Lands and Estate were declared redeemable, upon Payment of the Sums therein mentioned, and which Letter of Reversion was in the Earl of Caithness's Charter Chest at the Time of his Death, and with which Charter Chest the Earl of Broadalbane intromitted, and carried away the same, with the whole Rights and Charters of the Estate, without any Right, or the Warrant of any Judge; and that therefore the Appellant, in virtue of his Adjudication before mentioned, had a good and undoubted Right to the said Lands and Estate preferable to the Respondents.

The Respondent appeared to this Action, and in the Course of the Proceedings, some of the Defendants having died, the Suit was regularly revived against the Respondents their Representatives; and they, at different Times, exhibited the progressive Rights and Conveyances of the Estate of Caithness, from the Year 1592, to the Commencement of the Action, particularly the Disposition 1672, and Charter and Infeoffment before mentioned; the Conveyance by Sir Robert Sinclair to Glenorchy of his Debts and Apprisings in 1675.—And two Decrees of Apprisings, obtained by the said John Campbell of Glenorchy, against the Estate of Caithness in 1672, and 1675. With several other Writings relative to the Possession of the said Estate, and to the Proceedings of the Parliament of Scotland, and the Privy Council before mentioned; and there was further recovered by an Order of the Court out of the Hands of the Agent for the Respondents, the Letter of Reversion before mentioned, lately found among the Writings belonging to the Earl of Broadalbane, which is of the same Hand-writing with the Disposition 1672, and is signed at *Cannongate* of *Edinburgh* before the same Witnesses, whose Subscriptions are still entire; but the Date, and a Part of the Grantor's Subscriptions to the last Sheet, is torn from it, or destroyed by Time or Accident.

The Respondents having pleaded a Right by Prescription to the Lands and Estate in Question, which they alledged they had possessed above forty Years without any Interruption; and having insisted that the Title Deeds and Writings relative to the Estate had been delivered to the Earl of Broadalbane, in Consequence of his Right by the Disposition 1672, a Proof was thereupon allowed, and Evidences were examined, First, with Respect to the Respondents and their Predecessors Possession of the Estate of Caithness and others during the Years of Prescription; and secondly, with Respect to the Earl of Broadalbane's having access to the Charter-Chest and Writings of the Family of Caithness, immediately after the Death of George first Earl of Caithness, and his carrying off and possessing the same since that Time.

With Respect to the Possession of the Estate of Caithness and other Lands claimed by the Appellant; It appeared from the Testimony of several Witnesses, and from the Proceedings before the Parliament and Privy Council, That George first Earl of Caithness, died at *Thurso East*, in May 1676.—That in the Year 1677, George second Earl of Caithness attained Possession of his paternal Estate of *Keiss, Tisler, and Northfield*.—That in the Year 1679, he took Possession of the Estate and Earldom of Caithness, but was dispossessed thereof in 1680, by the Earl of Broadalbane by Force of Arms; and that the said George Earl of Caithness, was restored by Act of the Privy Council, to the Possession of his paternal Estate before mentioned in 1681; and continued to possess the same till his Death in 1698, when the Earl of Broadalbane again seized the Possession, and placed a Body of armed Men in the House of *Keiss*.

With Respect to the Earl of Broadalbane's having Access to and possessing the Charter Chest, and all the Writings of the Family of Caithness; it appears by the Testimony of several Witnesses.—That John Campbell of Glenorchy, afterwards Earl of Broadalbane, lived in Family with George first Earl of Caithness, when he died at *Thurso East* in May 1676; and was present at his Funeral some Weeks after.—That he soon after married the Countess Dowager of Caithness, and that he had access to, and possessed all the Title Deeds of the Family of Caithness, till they were delivered to the Purchasers of the Estate, or produced in this Action.

Upon this State of the Case, the Lord Minto, Ordinary, by an Interlocutor of this Date, "Found it proven, that the Earl of Caithness continued to possess the Lands of *Keiss, Tisler, and Northfield* until his Death, in the Year 1698, or 1699; and therefore repelled the Defence of an exclusive Right by Prescription *quoad* these Lands."

Upon a Representation for the Respondents against this Interlocutor, and Answers for the Appellant, the Lord Ordinary, of this Date, "refused the Desire of the Representation, and adhered to his former Interlocutor."

The Respondent, George Sinclair, gave in another Representation against the fore said Interlocutor, to which Answers were made for the Appellants; and the Lord Ordinary, of this Date, "repelled the Defences pleaded for the Defender *in hoc statu*, in Respect of the Answers. And Found, that the Production made for him is not sufficient, without the Aid of the positive Prescription, to exclude the Pursuers, *quoad* the Lands of *Keiss, How, Nibster, Tisler, and Northfield*, and therefore refused the Desire of the Representation."

A third Representation was preferred in Behalf of the Respondent George Sinclair, against the fore said Interlocutors, in which he insisted, that the Disposition 1672, and Charter and Infeoffment thereupon, were a sufficient Title to exclude the Appellants Claim; and Answers having been put into this Representation, the Lord Ordinary, of this Date, was pleased to take the Question to report to the whole Lords, and appointed Informations to be given in by both Parties.

These several Interlocutors only respecting the Lands of *Keiss, How, Tisler, and Northfield*, which are but a small Part of the Estate in Question, by Appointment of the Lord Ordinary, the Parties were afterwards heard by their Council, with respect to their Rights and Claims to the whole Estate and Earldom of Caithness; and the Lord Ordinary having taken the Debate to report to the whole Lords, he appointed Informations to be given in by both Parties.

Informations, and additional Informations, with a Memorial on Behalf of the Respondent George Sinclair, having been given in to Court, the Lord Ordinary, in respect these additional Informations related to Points not formerly argued, "Ordained the Parties Procurators to be ready to debate on these Points, and likewise upon the whole Cause."

Council having been accordingly heard, it was pleaded on Behalf of the Respondents, *imo*. That the Disposition 1672, and Charter and Infeoffment thereupon, afforded a Title sufficient to exclude the Appellant and all other Persons, claiming as Heirs of George Earl of Caithness the Grantor of that Disposition.—That the Estate was conveyed to the Earl of Broadalbane for an adequate Value, as he was himself a very considerable Creditor, and paid the Debt due to Sir Robert Sinclair, and an Annuity

Annuity of 666*l.* 1*3s.* 4*d.* to the Earl and Countess of Caithness. That the Earl of Broadalbane had consented that the Estate should be redeemable within the Space of six Years, as a Favour to the Earl of Caithness, in Case he should find a Purchaser who would give a higher Price or better Conditions. That he had further consented, that the Estate should be at any Time redeemable by the Heir Male of the Earl of Caithness's Body; but that no such Redemption having been made within the Space of Six Years, and the Earl having died without Issue Male, the Deed of Reversion was void and at an End, and the Conveyance became absolute and irredeemable.

23 A^d Jan. 6. Parl. 22d.

2d^o. That the Respondent's Title was confirmed by the positive Prescription established by the Act 1617, which declares "That whosoever shall possess their Land and Estate for the Space of Forty Years continually, and together, following and insuing the Date of their Infeoffment, and that peaceably, without any lawful Interruption made to them therein, they shall never thereafter be troubled or disquieted as to their Right in the said Lands." That the Respondents and their Predecessors had accordingly possessed the Estate in Question more than Forty Years from the Date of the Infeoffment in February, 1673, to the Commencement of this Action in April 1720, no lawful Interruption having been made during that Space.

24 A^d Jan. 3. Parl. 5.

3d^o. That the Appellant's Claim was now lost and expired, as it had not been prosecuted within the Years of Prescription established by the Act 1609, by which it is declared, "That the Party to whom any Obligation is made, that has Interest therein, shall follow the said Obligation within the Space of Forty Years, and take Document thereupon, and if he do not, it shall be prescribed and of none Avail, the said Forty Years being run and unpursued by the Party." That in this Case more than Forty Years had elapsed from the Expiry of the Reversion in 1678, and the Appellant had moved no Claim, or taken any Document on the Deed of Reversion, except by applying to Parliament, which was not a proper judicial Proceeding within the Meaning of the Act.

The Appellant's Answer.

The Appellant answered, That from the Transaction between the Earl of Caithness and Sir Robert Sinclair, in September 1672, and the Disposition of the Estate to the Earl of Broadalbane a few Days after, stipulating a Right of Redemption in Favour of the Earl of Caithness, and directing the same to be ingrossed in the Rights and Infeoffments of the Estate, it was most clear and manifest, that this Disposition was no other than a Trust Conveyance, for the special Purpose of paying and discharging the Incumbrances then affecting the Estate, from the current Rents and Profits, or by Sales or Mortgages of a Part thereof. That the Nature of this Trust was explained by the cancelled Deed of Reversion relative to the Disposition, and by the Transactions from the Date thereof till the Death of the Earl of Caithness in 1676. That it was understood and believed by the Parties, that the current Rents of the Estate would be sufficient to discharge the Debts due to Sir Robert Sinclair and others, or if these were insufficient, that the Remainder might be raised by Wadsets or Securities over the Estate. That the Limitation of the Reversion to the Term of Martinmas 1678 was only intended to secure to the Earl of Broadalbane the full and peaceable Possession of the Estate until the Trust should be executed. That in Execution of the Trust, it appeared several Parcels of the Estate were sold by Wadset and Feu-Rights, and the Prices arising from these, amounting to 6833 *l.* *sterl.* and the Current Rents of the Estate, amounting to the further Sum of 14,000 *l.* *sterl.* (after Payment of the Earl's Annuity) were more than sufficient to discharge the whole Incumbrances. That the Purpose of the Trust being fulfilled, the Earl of Broadalbane's temporary Right, by the Disposition 1672, was vacated and at an End, without the Necessity of any formal Act of Redemption. That even admitting it was necessary to use the Solemnities prescribed by the Deed of Reversion, within the Time limited, it appeared this was absolutely beyond the Power of the Heir of the Earl of Caithness, by Reason the Earl of Broadalbane kept Possession of the House, and of the Charter Chest, and whole Writings of the Family of Caithness. That the Time limited for redeeming the Estate having thus elapsed, by the Earl of Broadalbane's retaining the Deed of Reversion, he could not be permitted to plead the Benefit of a Forfeiture incurred by his own Act, besides that every Forfeiture of this Kind was justly excluded by the Law of Scotland, and the Equity of Redemption remained after the Lapse of the Term limited by the Deed of Reversion.

2d^o. With Respect to the positive Prescription pleaded for the Respondents, it was answered, that the Earl of Broadalbane's original Right being no other than a Trust Deed, in could not be the Foundation of Prescription, because the Trustee, holding the Estate only for Behoof of the Trustor, he could not in that Character set up a Title contrary to or destructive of the Right of his Constituent. That even admitting Prescription could take Place, the Respondents and their Predecessors had not, in this Case, possessed any of the Estates in Question, peaceably and without any lawful Interruption for the Space of Forty Years. That the Earl of Broadalbane obtained his Possession by Violence, and supported it by placing Garrisons in the Houses and Castles belonging to the Family Estate. That it was manifest the Earl of Caithness had taken the most effectual Means to interrupt this Possession, and to prosecute his own Right, by actually entering into the Possession of the whole Estate, by Addresses to his Majesty and his High Commissioner, by Pursuits before the Judicatures, and at last, when these proved ineffectual, by an Application to Parliament and to the Privy Council. That therefore, the Respondents could not found any Right upon the positive Prescription, as the Possession was not peaceable and without lawful Interruption. That they could as little avail themselves of the Negative Prescription, as the Earl of Caithness had, by every Means in his Power, prosecuted his Right, and actually taken Document thereupon, by judicial Processes, and by his Petition to the Parliament and Privy Council, where both Parties were heard, Proofs were taken and Judgment was given in Favour of the Earl of Caithness, as to a Part of the Estate claimed and possessed by the Earl of Broadalbane, in Virtue of the Disposition 1672. That therefore the Whole, the Disposition and Infeoffment could not be considered as an exclusive Right, or an absolute Right of Property to the Estate and Earldom of Caithness, and much less to the Lands of Keiss, Telfer, and Northfield, and the Lands of Murrill, Part of which last is still possessed by the Earl of Caithness.

Upon advising the Cause, the Lord Ordinary of this Date "Found that the Defenders (Respondents) have produced sufficient to exclude; and therefore absolved and decerned, superceding Extract till the 8th of June then next."

The Appellants preferred a Petition to the whole Lords against this Interlocutor, to which Answers were made for the Respondents, and the Lords of this Date "Adhered to the Lord Ordinary's Interlocutor, and refused the Desire of the Petition." And upon the 22d of October, 1753, the Respondents extracted a Decree of the Court in these Terms, according to the usual Form.

The Appellants conceiving themselves to be greatly aggrieved by the foresaid Interlocutor of the Lord Ordinary of the 20th of February, 1751, and by the Interlocutor of the whole Lords of the 22d of November 1751; and being advised that the said Interlocutors are contrary to Law and Equity, have appealed from the same to your Lordships, and humbly hope, that the said Interlocutors will be reversed or varied, for the following, among other

R E A S O N S:

The Conveyance executed by George Earl of Caithness, in 1672, of his whole Estate, Jurisdictions, and Title of Honour, can be understood in no other Light than as a temporary Trust-right. The Conveyance itself, without the Aid of the separate Deed of Reversion, establishes this Trust beyond a Doubt, as it expressly mentions the Power of redeeming the Estate, upon Payment of certain Sums of Money, said to be contained in the Deed of Reversion there referred to. It appears from the Evidence in the Cause, that these Sums consisted of a Debt of 6000 *l.* Sterling, due to Sir Robert Sinclair, and of Debts to the Extent of 3307 *l.* 1*s.* 9*d.* Sterling, due to the Earl of Broadalbane the Trustee, amounting in the whole to 9307 *l.* 1*s.* 9*d.* Sterling. It appears further from the Evidence, that 6832 *l.* Sterling was very speedily raised, by Sales of Part of the Estate, to which the Earl of Caithness consented. This Sum, and the Rents and Profits of the Estate, yielding 3000 *l.* Sterling yearly, were most certainly sufficient to clear all the Debts in the Space of six Years after the Date of the Trust-Deed; accordingly, the Appellant offered to prove, that all the Debts for which the Earl of Broadalbane held the Estate, as a Security, were satisfied and paid, before the Expiration of the Term limited for redeeming the Lands, in November 1678. If these Facts are true, as they in a great measure appear from the Evidence already brought, neither Law nor Equity will permit, that an Estate shall be carried off, upon Pretence of an absolute irredeemable Right, when the very

20 Feb. 1751.
1st Interlocutor appealed from.

22d Nov. 1751.
2d Interlocutor appealed from.

22d Oct. 1753.
Decree extracted.

very Deed of Conveyance itself declares it to be a Trust, or a Right in Security of Debts, which have been long since satisfied and paid.

Obj. 1. The Equity of Redemption stipulated by the Disposition 1672, and by the Deed of Reversion relative to it, expired in November 1678; whereby the Earl of Broadalbane's Infeoffment in 1673, became an absolute Right of Property, and excluded any Claim arising to the Heirs of the Earl of Caithness, in virtue of a Deed of Reversion, which was become void, and was duly cancelled.

Ans. 1. George Earl of Caithness died in May 1676, two Years and six Months before the Expiration of the Time limited for redeeming the Estate. It cannot be pretended, nor is it possible to believe, that the Earl of Caithness could deliver to the Earl of Broadalbane, or cancel a subsisting Deed of such Importance, by virtue whereof he preserved the only remaining Right he or the Heirs male of his Body had to redeem the Estate; nay, the only Right by which either he or the Countess of Caithness, after his Death, could claim the Annuity allotted for their Subsistence. If it was not, as most certainly it could not be given up, discharged, or cancelled by the Earl of Caithness, it could only come into the Hands of the Earl of Broadalbane, by his having Access to all the Writings of the Family, in the Manner mentioned in the Evidence. It appears, that George the second Earl of Caithness, and the subsequent Heirs, had a perpetual Struggle for the Recovery of the Estate; still averring, that it was conveyed to the Earl of Broadalbane in trust, and that he was fully satisfied for all he had advanced or paid on account of the Earl of Caithness: But as the Deed of Reversion was kept concealed, and contained a Clause dispensing with the not Delivery, contrary to the usual Form, it was never recorded; as the original Disposition 1672 was in the Hands of the Earl of Broadalbane; and what is still more remarkable, as the Charters and Infeoffments, the only Writings on Record, made no mention of the Clause of Reversion, though by the Disposition it was specially appointed to be engrossed therein. In this Situation the Heirs of George the first Earl of Caithness, were kept in absolute Ignorance of the Nature of the Transaction, nor did they obtain any Light till the Disposition 1672 was recorded on the 16th of September, 1719, and soon after the present Action was commenced. Therefore, in these Circumstances there can be no Foreclosure of the Equity of Redemption, as the Earl of Broadalbane, or those who stand in his Right, cannot claim the Benefit of a Forfeiture, which could never have taken place, except for the fraudulent Concealment of the Deeds, and Breach of the Trust declared in the original Deed.

Ans. 2. Where an Estate is given in pledge, or as a Security, for Payment of Debts, or Money lent, every Stipulation limiting the Time for redeeming the Estate, under an Irritancy or Forfeiture of the Owner's Right, is by Law justly rejected. Equity allows, that the Estate shall return to the Owner, upon Satisfaction of the just Demands of the Creditor, at any Time before a Decree of Foreclosure is obtained, declaring the Estate to belong to the Creditor.

Obj. 2. The Respondent's Rights are established, both by positive and negative Prescriptions. By the positive Prescription, in so far as they and their Predecessors have possessed the Estate in question upon the Title of the Charter and Infeoffment in 1673, peaceably, and without any lawful Interruption, above forty Years; and by the negative Prescription, in so far as the Appellant's Right has not been prosecuted, nor any proper legal Document has been taken during that Space.

Ans. 1. Prescription cannot in this Case be set up in bar of the Appellant's Right. The Disposition 1672 being a Trust-Deed, the Trustee held the Estate only for behoof of the Trustor, whose Right could never be hurt nor vacated by the Possession of the Trustee; nor could any Title be from thence created in favour of such Trustee, for his own Benefit, when his original and only Right was for the Benefit of another.

Ans. 2. It appears from the Evidence in the Cause, That after many Suits before inferior Judicatures, an Application to Parliament was made in 1681, and a Claim was entered for the whole Estate of Caithness, including the Lands of Keisi, How, Nibster, Tister, and Northfield, which had been conveyed to, and were then possessed by the Earl of Broadalbane. This Claim having been referred to the Privy-Council, the Question was judicially and legally tried, and the Earl of Caithness was restored to the Possession of these Lands, his paternal Inheritance: These Proceedings must therefore be considered as a lawful Interruption of Prescription, if it could be set up in bar of the Appellant's Right; for though the Judgment of the Privy-Council only regarded the Lands of Keisi, Tister, and Northfield, yet as these made a Part of the Estate and Earldom of Caithness, then claimed, the Currency of the positive Prescription was thereby interrupted, as to the whole Estate. In the same Manner the Earl of Caithness's Right was preserved from the negative Prescription, by his prosecuting his Claim before the Parliament and Privy-Council; as this was properly taking a Document upon his Right in Terms of the Act of Parliament, which prescribes no particular Form or Method of proceeding for this Purpose; and by the Law and Usage of Scotland, the Commencement of a Suit, or an Attempt to prosecute a Right in any legal Manner, is sufficient to preserve it from the unfavourable Plea of Prescription.

Ans. 3. The Appellant's Claim to the Lands of Keisi, Nibster, Tister, and Northfield, which were possessed for seventeen Years by George the second Earl of Caithness, by virtue of the Judgment of the Privy-Council, cannot be barred by Prescription, as has been declared by several Interlocutors of the Lord Ordinary. By the Interlocutors complained of, the Court has found, that the Respondent had produced sufficient to exclude the Appellant, as to the whole Estate, including these very Lands, without distinguishing the Grounds of their Judgment. But if Prescription most clearly cannot operate as a Bar against the Appellant's Title to these Lands (whatever Effect it may have as to the Earldom of Caithness) the Court must have determined for the Respondents, as to these Lands, singly upon the Foot of the Trust-Deed, which, for the Reasons already explained, is submitted, not to be an absolute, but a redeemable Right.

C. YORKE.

AL. WEDDERBURN.

Francis Sinclair, Esq, his Majesty's
Advocate for Scotland, } Appellant.

The Right Hon. John Earl of Broad-
albanc and others } Respondent.

The Appellant's CASE.

To be heard at the Bar of the House of Lords on Wed-
nesday the 2nd Day of February, 1759.

G. YORKE
ALL WEDDERBURN.